

A Chin Mee Keong & Ors v Pesuruhjaya Sukan

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-70 OF 2005
JAMES FOONG, LOW HOP BING AND SURIYADI JJCA
9 AUGUST 2007

C *Administrative Law — Remedies — Certiorari — Applicants were office bearers of association — Applicants sued in their own names as committee members of association — Whether applicants had locus standi to make an application for leave to apply for certiorari — Whether application was frivolous and vexatious*

D *Administrative Law — Remedies — Certiorari — Application to quash order of revocation of registration of applicants' association by Sports Commissioner — Alternative remedy of appeal by virtue of s 21(1)(a) of the Sports Development Act 1997 to Minister — Allegations that Minister was biased, prejudiced and had prejudged subject matter — Applicants did not exercise the alternative remedy — Whether existence of alternative domestic remedy justify refusal of leave*

E *Civil Procedure — Parties — Locus standi — Applicants were office bearers of association — Applicants sued in their own names as committee members of association — Whether the applicants had locus standi to sue*

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G The appellants on their own, and on behalf of the Malaysia Taekwondo Association (MTA) had applied under O 53 r 3(2) of the Rules of High Court ('the RHC') a judicial review application, for an order that they be granted leave to apply for an order of certiorari, to remove a show cause letter dated 15 April 2005 and to quash the order of revocation of registration of the appellants' association. The Association was until 6 May 2005 a registered sports body pursuant to s 18 of the Sports Development Act 1997 ('the Act') but on 6 May 2005 became an unregistered and unincorporated sports body with no legal personality. This order of revocation of registration, dated 6 May 2005 was issued by the respondent under s 20 of the Act.

H The order of revocation of registration came about as the Sports Commissioner had directed the MTA to amend its three constitution, to allow voting rights to clubs, a power of direction which was disputed by the appellants. MTA did not give in, resulting in the respondent deregistering the MTA. MTA could have appealed to the Minister of Sports against the decision of the respondent under s 21(1)(a) of the Act.

I However MTA alleged that the Minister had made various 'uncontradicted, unretracted and unchallenged press statements' showing the Minister's prejudice and prejudgment. A preliminary objection was also raised in the high court that the appellants had no locus standi to make this application as the applicants were not authorized persons to sue for and on behalf of MTA. The high court dismissed the application principally on the ground that the judicial review application was

premature as the appellants had an alternative remedy under s 21(1)(c) of Act to appeal to the Minister. The high court stressed that it was premature to judge the Minister for being bias, prejudiced and had prejudged the issue when she had not even heard the appeal.

Held, allowing the appeal:

- (1) (per **James Foong JCA**) For certain, an association cannot sue in its own name. Preferably an action should be commenced by its registered public officer. If none is registered as such, then it is permissible for any office bearer of the association to mount a claim for and on behalf of its members. This would put him on the same footing as a representative for others having the same interest in the proceeding which is permitted under O 15 r 12(1) of the RHC. In the instant case, the appellants did exactly that. They were office bearers of the MTA and they sued in their own names as committee members of MTA. This meant that they were representing the members of MTA by virtue of them being elected by the latter to such position. Though only six out of ten committee members brought this action, this was immaterial since even a single member can represent other members (see paras 22–23).
- (2) (per **James Foong JCA**) If the issue of an alternative remedy was raised at leave stage, it must still be considered in the light of established test rather than leaving it completely for evaluation at the substantive hearing of the motion of certiorari after leave had been granted. The allegations that the Minister was biased, prejudiced and had prejudged the subject matter of the appeal that may be brought before her under s 21(1)(a) of the Act, although not proven, but at this stage of the proceeding the court was not concerned with an in-depth search for the truth. This should be undertaken at the next level, after leave was granted, when the matter could be fully investigated. At this stage, all that was necessary was for the court to consider, based on what was disclosed by the appellants, whether there was an arguable case in favour of granting an order of certiorari (see paras 31 & 34).
- (3) (per **Suriyadi JCA**) The appellants had to establish a prima facie case for leave, in that their application was not frivolous or vexatious. Having perused the evidence, apart from a personal interest by the respective appellants who had seen their association and respective positions becoming history, the matter of public interest in this application was quite uppermost for consideration. This factor of public interest, which was submitted at the outset of the hearing, and as a consequence of deregistration by the respondent of the MTA on 1 January 1998, had led to the country being deprived of a Taekwan Do representation at the Doha Meet, the Olympics and some other sporting event. Only by reinstatement as a sports body by the respondent (the Commissioner of Sports Malaysia), would Malaysia have a fighting chance to obtain some glory in international sporting meets, let alone the appellants redeem themselves. In a word the intention, the action and the probable positive result that would ensue from a successful reinstatement, could never be construed as frivolous or vexatious. In fact these findings would have sufficed for a High Court judge to grant 'order in terms' for the leave application (see paras 93–94).

- A (4) (per **Suriyadi JCA**) The all paramount question in this case was, must the issue of domestic remedy be canvassed and decided by the judge at this early stage ie at the stage of the leave application? The judge had no affidavit in reply to peruse and consider, an incomplete set of evidential and legal argument regarding the factor of domestic remedy, the appellants were harping on some
- B other equally serious issue let alone supported by evidence that the Minister could be biased, to expect the judge to apply his discretion correctly then (as regards the issue of alternative remedy), was an unreasonable expectation. In fact as there was no affidavit in reply the appellants should have won hands down in the circumstances of the case. Surely the purpose of leave would be
- C defeated if such a substantive matter such as this must be resolved at such an early stage (see paras 100–101).
- (5) (per **Low Hop Bing JCA** dissenting) In applying for leave under O 53 r 2(2), instead of preferring an appeal to the Minister under s 21(1) of the Act, the applicants had not exercised and indeed had abandoned their rights in having
- D chosen not to exhaust the alternative remedy made available to them under s 21(1). In the light of the Federal Court judgment in *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal*, the High Court is at liberty and indeed duty bound to consider any point raised, including the alternative remedy point, at the first stage of leave application under O 53 r 3(1). The consideration of whether leave should be granted or refused in
- E limine involves an exercise of discretion. That discretion must be exercised according to established judicial principles, having regard to all the facts and circumstances of each particular case (see paras 67 & 78).
- (6) (per **Low Hop Bing JCA** dissenting) The Sports Commissioner by issuing the show cause letter to the applicants had given the applicants an opportunity of being heard. That was clearly in compliance with the fundamental rules of
- F natural justice. On the part of the Sports Commissioner, there was not an iota of a breach, less so a serious breach, of the fundamental principles of natural justice. Allegations were actually directed against the Minister. However, the Minister was not a party to the proceedings before the high court nor in the
- G appeal. These allegations which the applicants had made against the Minister were irrelevant to the consideration of the application before the high court and in the instant appeal. Those allegations would only be called into question and consideration, if at all, when there was an application for leave to commence judicial review against the Minister (see paras 81–82).

H [Bahasa Malaysia summary

- I Perayu-perayu melalui diri mereka sendiri, dan bagi pihak Persatuan Taekwando Malaysia ('PTM') telah memohon di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah Tinggi ('KMT') untuk satu permohonan kajian semula kehakiman, untuk satu perintah bahawa mereka diberikan kebenaran untuk memohon satu perintah certiorari, untuk mengenenpikan surat tunjuk sebab bertarikh 15 April 2005 dan satu perintah untuk membatalkan penarikan kembali pendaftaran persatuan perayu-perayu. Persatuan tersebut telah sehingga 6 Mei 2005 satu badan sukan yang didaftarkan menurut s 18 Akta Pembangunan Sukan 1997 ('Akta tersebut') tetapi

pada 6 Mei 2005 telah dijadikan satu badan sukan yang tidak didaftarkan dan tidak diperbadankan tanpa personaliti undang-undang. Perintah penarikan kembali pendaftaran, bertarikh 6 Mei 2005 telah dikeluarkan oleh responden di bawah s 20 Akta tersebut. Perintah penarikan kembali pendaftaran terjadi apabila Pesuruhjaya Sukan mengarahkan PTM meminda tiga perlembagaannya, untuk membenarkan hak mengundi kepada kelab-kelab, satu arahan yang dipertikaikan oleh perayu-perayu. PTM enggan berbuat demikian, yang menyebabkan responden membatalkan pendaftaran PTM. PTM boleh merayu kepada Menteri Sukan terhadap keputusan responden di bawah s 21(1)(a) Akta tersebut. Akan tetapi PTM mengatakan bahawa Menteri tersebut telah membuat beberapa pernyataan akhbar yang 'tidak bercanggah, tidak ditarik balik dan tidak dicabar' yang menunjukkan Menteri tersebut berprejudis dan bersikap pra-pengadilan. Satu bantahan awal juga dibangkitkan di mahkamah tinggi bahawa perayu-perayu tidak mempunyai locus standi untuk membuat permohonan ini oleh kerana pemohon-pemohon bukannya orang yang diberi kuasa untuk menyaman untuk dan bagi pihak PTM. Mahkamah tinggi menolak permohonan tersebut pada asasnya atas dasar permohonan kajian semula kehakiman adalah pra masa oleh kerana perayu-perayu mempunyai remedi alternatif di bawah s 21(1)(c) Akta tersebut untuk merayu kepada Menteri. Mahkamah tinggi menegaskan bahawa ia adalah pra masa untuk mengatakan Menteri tersebut adalah berat sebelah, berprejudis dan telah mengadili isu tersebut apabila beliau belum mendengar pun rayuan tersebut.

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Diputuskan, membenarkan rayuan tersebut:

- (1) (oleh **James Foong HMR**) Sudah tentunya, suatu persatuan tidak boleh menyaman di atas namanya sendiri. Sesuatu tindakan seharusnya dimulakan oleh pegawai am berdaftar. Sekiranya tiada yang didaftarkan, maka ia adalah pemegang jawatan persatuan tersebut untuk memulakan satu tindakan untuk dan bagi pihak ahli-ahlinya. Ini akan meletaknya pada tahap yang sama sebagai wakil kepada lain-lain yang mempunyai kepentingan yang sama di prosiding tersebut yang dibenarkan oleh A 15 k 12(1) KMT. Dalam kes ini, perayu-perayu telah berbuat demikian. Mereka adalah pemegang jawatan PTM dan telah menyaman di atas nama mereka sendiri sebagai pemegang jawatan PTM. Ini bermakna bahawa mereka mewakili ahli-ahli PTM menurut pelantikan mereka ke jawatan tersebut oleh ahli-ahlinya. Walaupun hanya enam daripada sepuluh pemegang jawatan membawa tindakan ini, ini adalah tidak material oleh kerana seorang ahli dengan sendirinya boleh mewakili ahli-ahli yang lain (lihat perenggan 22–23).
- (2) (oleh **James Foong HMR**) Sekiranya isu remedi alternatif dibangkitkan di tahap kebenaran, ia mesti dipertimbangkan berdasarkan ujian kukuh dan bukannya membiarkannya untuk dinilai sepenuhnya di pendengaran substantif certiorari selepas kebenaran dibenarkan. Alegasi-alegasi Menteri berat sebelah, berprejudis dan telah mengadili perkara pokok rayuan tersebut yang berkemungkinan akan dibawa kepadanya di bawah s 21(1)(a) Akta tersebut, walaupun tidak dibuktikan, tetapi pada tahap prosiding ini mahkamah tidak berminat dengan satu carian yang mendalam akan fakta sebenarnya. Ini patut dibawa ke tahap seterusnya, selepas kebenaran diberikan, apabila perkara ini dapat disiasat dengan sepenuhnya. Pada tahap ini, apa yang

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- A perlu ialah hanya untuk mahkamah mempertimbangkan, berdasarkan apa yang dikemukakan oleh perayu-perayu, sama ada terdapat kes yang perlu dibicarakan dalam memberikan perintah certiorari tersebut (lihat perenggan 31 & 34).
- B (3) (oleh **Suriyadi HMR**) Perayu-perayu harus membuktikan satu kes prima facie untuk kebenaran, iaitu permohonan mereka tidak remeh dan menyusahkan. Selepas mengkaji keterangan, selain daripada kepentingan peribadi oleh perayu-perayu masing-masing yang telah menyaksikan persatuan mereka dan kedudukan mereka masing-masing menjadi sejarah, perkara kepentingan awam di dalam permohonan ini adalah pertimbangan yang paling penting.
- C Faktor kepentingan awam, yang telah diujahkan di permulaan pendengaran, dan disebabkan penarikan pendaftaran PTM oleh responden pada 1 Januari 1998, telah menyebabkan negara ini tidak diwakili oleh satu representasi dari Taekwan Do di Doha Meet, Olimpik dan lain-lain acara sukan. Hanya melalui pendaftaran semula sebagai satu badan sukan oleh responden (Pesuruhjaya Sukan-sukan Malaysia), Malaysia dapat mencapai peluang untuk memperoleh keunggulan di sukan-sukan antarabangsa, dan membenarkan perayu-perayu untuk menebus mereka. Dalam satu perkataan, niat, tindakan dan kemungkinan keputusan positif yang dapat dicapai melalui pendaftaran semula, tidak boleh dianggap sebagai remeh dan menyusahkan. Sebenarnya, penemuan-penemuan ini sepatutnya mencukupi untuk hakim mahkamah tinggi memberikan 'perintah seperti yang dipohon' kepada permohonan untuk kebenaran tersebut (lihat perenggan 93–94).
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- F (4) (oleh **Suriyadi HMR**) Soalan yang paling utama di kes ini ialah, haruskah isu remedi domestik diujahkan dan diputuskan oleh hakim di tahap yang awak ini, iaitu pada tahap permohonan untuk kebenaran? Hakim tidak mempunyai affidavit jawapan untuk mengkaji dan menimbangkan, dan satu set keterangan dan hujahan undang-undang yang tidak sempurna berhubung dengan factor remedi domestik, perayu-perayu juga menghujah isu yang sama penting dan disokong oleh bukti bahawa Menteri tersebut berkemungkinan berat sebelah, untuk membolehkan hakim memakai budi bicaranya dengan betul pada masa tersebut (berhubungan dengan isu remedi alternatif), adalah satu jangkaan yang tidak munasabah. Sebenarnya tiada affidavit jawapan perayu-perayu sepatutnya menang dalam keadaan-keadaan kes ini. Tentunya tujuan kebenaran akan ditewaskan sekiranya perkara substantif sedemikian harus diselesaikan pada peringkat seawal ini (lihat perenggan 100–101).
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- H (5) (oleh **Low Hop Bing HMR** menentang) Dalam memohon satu kebenaran di bawah A 53 k 2(2), pemohon-pemohon tidak menggunakan hak mereka untuk merayu kepada Menteri di bawah Akta tersebut, tetapi telah meninggalkan hak mereka dalam memilih untuk tidak menggunakan remedi alternatif yang sedia ada di bawah s 21(1). Memandangkan penghakiman Mahkamah Persekutuan di kes *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal*, Mahkamah Tinggi adalah bebas dan malahan adalah terikat untuk menimbangkan sebarang hujahan yang dibangkitkan, termasuk hujahan remedi alternatif, pada tahap pertama permohonan kebenaran di bawah A 53 k 3(1). Pertimbangan sama ada kebenaran harus diberikan atau ditolak in limine melibatkan satu penggunaan
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budi bicara. Budi bicara tersebut harus digunakan menurut prinsip-prinsip kehakiman yang tetap, setelah mengambilkira kesemua fakta-fakta dan keadaan-keadaan kes tersebut (lihat perenggan 67 & 78).

- (6) (oleh **Low Hop Bing HMR** menentang) Pesuruhjaya Sukan dalam mengeluarkan surat tunjuk sebab kepada pemohon-pemohon telah memberikan peluang kepada pemohon-pemohon untuk didengar. Itu adalah jelas mengikut peruntukan dan rukun keadilan asasi. Dipihak Pesuruhjaya Sukan, tiada sekelumit kemungkiran, apa lagi kemungkiran yang serius, terhadap prinsip-prinsip asas keadilan asasi. Pengataan-pengataan sebenarnya ditujukan terhadap Menteri tersebut. Akan tetapi, Menteri tersebut bukanlah pihak kepada prosiding-prosiding sebelum mahkamah tinggi ataupun di peringkat rayuan. Pengataan-pengataan yang telah dibuat oleh pemohon-pemohon terhadap Menteri tersebut adalah tidak relevan untuk diambil kira dalam permohonan sebelum mahkamah tinggi dan di peringkat rayuan. Pengataan-pengataan tersebut hanya akan disoal dan dipertimbangkan, sekiranya ada, apabila terdapat permohonan untuk kebenaran untuk memulakan kajian semula kehakiman terhadap Menteri tersebut (lihat perenggan 81–82).]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 231–469. For cases on locus standi of parties, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5082–5102.

Cases referred to

- Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* (Bar Council Malaysia, intervener) [2004] 2 MLJ 257 (refd)
- George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319 (refd)
- Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 (refd)
- IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (refd)
- JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (refd)
- Karting Club of Singapore v David Mak & Ors* [1985] 2 MLJ 280 (refd)
- Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602
- King, The v Wandsworth Justices* [1942] 1 KB 281 (refd)
- Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 (refd)
- Lim Cho Hock v Speaker Perak Legislative Assembly* [1979] 2 MLJ 85 (refd)
- Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68 (refd)
- Mohd Latiff bin Shah Mohd v Tengku Abdullah ibni Sultan Abu Bakar* [1995] 2 MLJ 1 (refd)
- Naga Jaguh Development Sdn Bhd v Danaharta Urus Sdn Bhd* [2005] 3 CLJ 818 (refd)
- Ong Boon Seong v Syed Hussein Alatas* [1971] 2 MLJ 218 (refd)
- Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors* [2007] 5 MLJ 125 (refd)
- QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 (refd)
- R v Postmaster General Exp Car Michael* [1928] 1 KB 291 (refd)

- A** *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 (refd)
Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 MLJ 53 (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2003] 4 MLJ 332 (refd)
- B** *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707 (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442 (refd)
- C** *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128 (refd)

Legislation referred to

- Courts of Judicature Act 1964 Schedule para 1
 Government Proceedings Act 1948 s 29
- D** Pengurusan Danaharta Nasional Berhad Act 1998 s 72
 Rules of High Court 1980 O 15 r 12(1), O 53 rr 1, 2(4), 3(2), 4
 Societies Act 1966 s 9(c)
 Specific Relief Act 1950 s 54
 Sports Development Act 1997 ss 20(1)(e), 21(1)(c), (2)
- E** **Appeal from:** Civil Suit No R2–25–88 of 2005 (High Court, Kuala Lumpur)
MS Murthi (Murthi & Partners) for the appellants.
Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

F **James Foong JCA:**

INTRODUCTION

- G** [1] The appellants, on their own, and on behalf of the Malaysian Taekwondo Association ('MTA'), applied under O 53 r 3(2) of the Rules of High Court 1980 ('the RHC') for:
- 1 leave to apply for an order of certiorari to:
- H** (a) remove a 'show cause order' dated 15 April 2005 issued by the respondent and,
- (b) quash the order issued by the respondent on 6 May 2005 revoking the registration of MTA;
- 2 for an interim order staying all 'proceedings under O 53 r 3(5) Rules of the High Court 1980'; and
- I** 3 the costs of this application be costs in the cause.

[2] Though O 53 r 3(2) of the RHC requires this application to be made *ex partes*, I noticed, from the notes of proceedings, that it was instead heard *inter partes*, with

Ms Mary Lim, Senior Federal Counsel, representing and arguing for and on behalf of the respondents”.

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BACKGROUND

[3] The facts of this case are as follow: The appellants are the President, Vice Presidents, Secretary and Treasurers respectively of MTA. MTA is the only taekwondo association (out of three in this country) recognized by the Olympic Council of Malaysia (‘OCM’) to represent the sport of taekwondo in this country. The constitution of MTA provides for voting right to only 17 of its members. They are: (a) a representative from each of the 13 state taekwondo associations; (b) a representative from each of the taekwondo associations from the Territories of Kuala Lumpur and Labuan; (c) representative each from the Malaysian Armed Forces and the Malaysian Universities Sports Council. According to the appellants, this reflects a fair representation of members across the country. Aside from these members who have representative voting rights, there is another category of membership known as associate members. They do not have representative voting rights. These members are from various taekwondo associations across the country with the highest number concentrating in Kuala Lumpur. Due to their lack of representative voting rights, they had, according to the appellants, applied pressure on the respondent to change its constitution to allow them to vote. When the members of MTA resisted, the respondent on 15 April 2005 issued a show cause letter to MTA demanding to know why MTA should not be de-registered under s 20(1)(e) of the Sports Development Act 1997 (‘the SD Act’). This section reads:

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Revocation or suspension of registration by Commissioner

20(1) The Commissioner may revoke or suspend the registration of a sports body if the Commissioner is satisfied that such sports body (e) is hindering the development of the particular sport and it is in the public interest to revoke or suspend its registration.

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[4] Then on 6 May 2005, when the respondent refused to accept the explanation provided by MTA in response to the show cause letter, the respondent issued an order to de-register MTA.

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[5] MTA could have appealed to the Minister of Sports against the decision of the respondent under s 21(1)(c) of the SD Act which provides:

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Any sports body aggrieved by a decision of the Commissioner —

in revoking or suspending the registration of such sports body may, within thirty days from the date of the notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.

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[6] And under s 21(2) of the SD Act:

Before making any decision under subsection (J), the Minister may refer the matter to the Sports Advisory Panel.

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[7]

Instead of following this process, the appellant elected to file this application in the High Court for judicial review. The reasons proffered by them are:
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(1.)

The appeal to the Minister of Sports ('the Minister') is not mandatory. Section 21(1)(c) of the SD Act provides that 'such sports body *may*' appeal. The word 'may' connotes a choice as compared to the word "shall" which denotes a mandatory act. Thus the appellants have an option to either appeal to Minister or seek an alternative remedy to challenge the decision of the respondent. The latter was preferred.
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(2)

It is futile to appeal to the Minister under s 21(1)(c) of the SD Act since the honourable Minister is biased and prejudiced against the current stand of MTA. Besides, she has also prejudged this dispute as derived from her conduct and speeches reported in a national daily, particularly these:
On 13 January 2005 the *New Straits Times* ('NST'):
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Sports Minister Datuk Azalina Othman Said, in a decision that could shift the balance of power in national sports associations, on Tuesday ordered the Malaysian Taekwondo Association (MTA) to amend their constitution to allow clubs direct affiliation and voting rights, just like state affiliates

On 1 February 2005, NST:
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Granting clubs voting rights is what Azalina ordered but that as far as MTA was concerned, would appear easier said than done.

On 8 February 2005, NST:
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MTA were instructed by Sports Minister Datuk Azalina Othman Said to amend their constitution to give clubs voting rights and extra ordinary general council ('EGC') meeting was held last Tuesday to do that.

On 14 April 2005, NST:
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Get your house in order!

That is the message to the Malaysian Taekwondo Association (MTA) from the Sports Minister Datuk Azalina Othman Said.
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And if MTA continue to hamper the admission of clubs into their structure and remain defiant to the directives from her or the Sports Commissioner's Office, the association can forget about funding from the Ministry or the National Sports Council (NSC).
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'If MTA say they don't want clubs in their structure and they don't want to heed directives from the Minister or the Sports Commissioner's Office, don't come to us for funding,' said Azalina after chairing her Ministry's post cabinet meeting in Bukit Jalil yesterday.

On 28 April 2005, NST:
- On April 13 this year, the Sports Minister Datuk Azalina Othman Said issued a stern reminder to put their house in order, And if the national body continue to hamper the admission of clubs into their structure or remain defiant to the directives from her, or the Sports Commissioner's Office, the association can forget about funding from the Ministry or the NSC.

On 4 May 2005, NST:

But Sports Minister Datuk Azalina Othman Said issued a directive to the MTA to give clubs direct affiliation and voting rights in January and Elyas followed up with a dialogue on Feb 16 and presented the association with 5 models of governance, all granting clubs voting rights.

[8] The appellants stressed that as none of the aforesaid press reports were ever retracted or clarified by the Minister, it must be implied that the Minister 'was the mastermind directing the Commissioner of Sports to harass MTA to make the constitutional amendments on pain of refusal of funds to MTA'.

[9] Further, the appellants contended that the Minister is resentful of MTA as she is a holder of a black belt in taekwondo from a rival association (International Taekwondo Federation ('ITF')) which is not recognized as the governing taekwondo body in Malaysia. Though she has attempted to elevate the status of ITF by proposing a merger of MTA, ITF and one other local taekwondo association into a single national body this failed because the governing body of MTA prohibited such merger.

[10] Relying on these assertions, the appellants are of the view that 'the Minister is disqualified to sit in judgment over the matter of appeal under s 21 of the SD Act and MTA has decided to come to the court directly'.

RULING OF THE HIGH COURT

[11] When this application came before the High Court, it was dismissed principally on the ground that the appellants have an alternative remedy under s 21(1)(c) of the SD Act to appeal to the Minister. The learned judicial commissioner who heard the case stressed that it is premature to judge the Minister for being bias, prejudiced and had prejudged the issue when she has not even heard the appeal.

A PRELIMINARY ISSUE: WHETHER THE APPELLANTS HAVE THE RIGHT TO MAKE THIS APPLICATION?

[12] Before I deal with the substantive issue, there is one preliminary matter raised by the respondent that needs to be dealt with. This concerns O 53 r 2(4) of the RHC which says:

Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[13] According to the federal counsel, the appellants have no locus standi to make this application. She contended that the applicants are not authorized persons to sue for and on behalf of MTA. Further, the appellants constituted only six often committee members of MTA. The views and positions of the other four are unknown. Thus, it is unsafe and improper to accept the appellants as proper parties in this action.

A [14] I noticed that this issue was raised in the High Court but unfortunately no express ruling was made by the learned judicial commissioner on it. Instead, the learned judicial commissioner proceeded straight into the substantive issues. I am of the view that by such action it must be implied that the learned judicial commissioner must have dismissed this preliminary objection otherwise, if she would have dismissed this action on this ground from the Very beginning

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[15] It is my view that MTA being an association falls within the governing provisions of the Societies Act 1966 ('Societies Act'). Section 9(c) of the Societies Act provides:

C ... a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society; ...

D [16] Since there is no evidence before us to indicate that any of appellants are registered as the public officer of MTA with the Registrar of Societies, I must take it that none of them are statutorily appointed to take on the responsibility of suing and being sued for and on behalf of MTA. In such a situation, can the appellants, in their official capacities as committee members of MTA institute this proceeding for themselves and on behalf of MTA against the respondent?

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[17] To influence us that this cannot be done, federal counsel cited the Singapore case of *Karting Club of Singapore v David Mak & Ors* [1985] 2 MLJ 280 at p 283 where Chua J declared:

F An unincorporated member club, not being a partnership or legal entity, cannot sue or be sued in the club name (see *Cityplace London Association for Protection of Trade v Greenlands, Ltd* (1916) 2 AC 15. The Karting Club of placecountry-regionSingapore is unincorporated and consequently cannot be made a plaintiff to this action.

G [18] Though I agree that this is the correct position of the law but MTA, as a body, did not institute this action. The appellants did so themselves and on behalf of MTA. Could this be done? I believed that this is permitted as can be seen from the following authorities:

H [19] In *Ong Boon Seong v Syed Hussein Alatas* [1971] 2 MLJ 218 at p 221 Abdul Hamid J (as he then was) said:

I It is argued that the plaintiff has no right to start this action for and on behalf of the society as he is not a registered public officer. Mr Ng Ek Teong counsel for the plaintiff submitted that the plaintiff is suing in his own name and he has properly instituted this legal action on the grounds, first, as a member, he instituted this legal action in the capacity of his individual right as a member. Secondly, he sues in his own right as a person who has been appointed secretary-general; and thirdly, he sues in the representative capacity authorized by the central committee. To my mind, it cannot be denied that as a member of the party, the plaintiff has the right to sue. Whilst it may be true that he sued in his own name, the fact

remains that at all material times, he was holding the office of deputy secretary-general and a member of the central committee. In my opinion, the plaintiff is competent to institute these proceedings.

A

[20] This approach was adopted in *Mohd Latiff bin Shah Mohd v Tengku Abdullah ibni Sultan Abu Bakar* [1995] 2 MLJ 1 when Zakaria Yatim J overruled the objection on legal capacity of the plaintiffs who were suing on behalf of themselves and all members of the club.

B

[21] Then in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 the Federal Court when dealing with an almost identical situation suggested (at p 210):

C

First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act and s 9(c) thereof specifically provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that is so, then we would think that if it was at all necessary for the Association to sue jointly as a plaintiff a representative claim by one or more of its office bearers on behalf of all the members would be a solution.

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[22] From these authorities, it is clear that the approach should be these: Firstly, for certain, an association cannot sue in its own name. Preferably an action should be commenced by its registered public officer. If none is registered as such, then it is permissible for any officer bearer of the association to mount a claim for and on behalf of its members. This would put him on the same footing as a representative for others having the same interest in the proceeding which is permitted under O 15 r 12(1) of the RHC.

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[23] In our instant case, the appellants did exactly that. They are office bearers of the MTA and they sued in their own names as committee members of MTA. This means that they are representing the members of MTA by virtue of them being elected by the latter to such position. Though only six out of ten committee members brought this action, this is immaterial since even a single member can represent other members. Further, under O 53 r 2(4) of the RHC there is no restriction on the capacity of the person making an application for judicial review except that he must be adversely affected by the decision of the public authority who made the decision under review. The appellants being members of MTA are certainly persons who are adversely affected by the decision of the respondent and as such they should be allowed to seek relief from the court.

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LEGAL PRINCIPLES

[24] There is no dearth of legal authorities disclosing the test to be applied for an application for leave of certiorari. A comprehensive summary of this is set out by Gopal Sri Ram JCA in *Tang Kwoor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60. I do not intend to repeat all the authorities cited except to identify some which are pertinent and relevant in the course of my analysis to

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A ascertain whether the court below had asked the right questions and taken into consideration relevant matters into account.

[25] The starting point is to be reminded that there are two stages in an application under O 53 of the RHC. The first is the leave stage. And only after leave is granted under O 53 r 1 of the RHC can an applicant proceed to apply for an order of certiorari under O 53 r 2 of the RHC.

[26] At leave stage, which is the status of the appellants' application, Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at p 643 said:

C The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion to give him leave to apply for that relief.

[27] This principle was elaborated locally by Lim Beng Choon J in *George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319 (at p 321):

E At the outset, it is very significant to take note that the application in the instant proceeding is not one for an order of certiorari but rather for leave to apply for such an order. On principle and authority, I am of the view that at this stage of the proceeding, the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a court has to consider is that the applicant must produce sufficient evidence to sustain a prima facie case that a public officer or authority that made the decision had acted unlawfully or that he or it had in its exercise of the administrative discretion acted ultra vires the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

[28] And for a concise description of this principle, Raja Azlan Shah Ag LP (as his Royal Highness then was) in *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68 declared (at p 70):

H We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. When this Court grants leave, it has jurisdiction to hear the substantive motion itself.

I IS THE APPELLANTS' CASE FRIVOLOUS AND VEXATIOUS TO MERIT THE REFUSAL OF LEAVE IN LIMINE?

[29] So the question to be asked in our instant case is whether the appellants' application is frivolous and vexatious to justify refusal of leave in limine. The learned

judicial commissioner answered this in the affirmative based primarily on the fact that there exist an alternative domestic remedy for the appellant to appeal against the decision of the respondent under s 21(1)(c) of the SD Act. But does the availability of this remedy alone justify the refusal of leave to apply for an order of certiorari?

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[30] I am aware that this court in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, has gone as far as to declare:

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In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application.

C

[31] But I am not inclined to accept such a wide proposition in the light of the authorities disclosed. This is too broad an interpretation given to the cases cited. To summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail in limine on the issue of availability of an alternative remedy would automatically be permitted at leave stage. It must be reminded that there are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles particularly that of *Mohamed Nordin bin Johan v Attorney General, Malaysia* which is a Federal Court case and the Supreme Court decision in *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave in limine. In my view, if the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at the substantive hearing of the motion of certiorari after leave has been granted.

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[32] In general, judicial review is not available where there is an alternative remedy by way of appeal. But there are exceptions to this general rule. Hashim Yeop A Sani SCJ (as he then was) in the Supreme Court case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 at p 189, declared:

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In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

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[33] This ruling was made after the Supreme Court had observed:

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The learned judge referred to a number of English cases mostly on natural justice and conclude correctly that it was not an invariable rule that if an appeal lies to a higher tribunal the court will refuse the remedy of judicial review. Then he proceeded to ask the questions what are the circumstances where remedy would be available in spite of appeal procedures provided by Parliament. He said that since natural justice plays a prominent role in

- A** administrative law he was of the view that a breach of natural justice does fall within the exceptions. We can hardly quarrel with this general proposition. However, it can hardly be missed that in recent years the law on judicial review has made tremendous progress and the courts are now more flexible in the use of the prerogative powers to check excess or abuse of powers.
- B**
- [34]** So in the circumstances of this case is there ‘a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice’ to preclude an avenue for judicial review when alternative remedy by way of appeal is available? On the ground of a lack of
- C** jurisdiction I do not think so. And neither do I think there was a blatant failure to perform some statutory duty on the part of respondent. But judging from the appellants’ allegations alluded to by the appellants, particularly that the Minister is biased, prejudiced and has prejudged the subject matter of the appeal that may be brought before her under s 21(1)(c) of the SD Act, then if she is there would be a
- D** breach of the principles of natural justice. One cannot envisage a person sitting in judgment to be fair and unbiased if he or she had fully participated in the dispute between the parties and had influenced the decision which is the subject matter of the hearing before him. This certainly opposes the requirement that the arbiter must be fair and impartial. Indeed, I have reminded myself of what the learned judicial
- E** commissioner has said in her judgment, that these allegations against the Minister are not proven. But at this stage of the proceeding the court is not concerned with an in-depth search for the truth. This should be undertaken at the next level, after leave is granted, when the matter can be fully investigated. At this stage, all that is necessary is for the court to consider, based on what is disclosed by the appellants, whether
- F** there is an arguable case in favour of granting an order of certiorari. For authority, the first is the Supreme Court case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd.* [1995] 2 ML J 442 where Edgar Joseph Jr SCJ said:
- G** *R v Secretary of State for the Home Department, ex p Rukshanda Begum* (1990) COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:
- (i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
- H** (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
- (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the
- I** judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[35] The second is the High Court decision of *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128 where Ramly Ali J said:

At this stage of the proceedings, the court need not go into the matter in great depth. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a guide perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has, been fully argued at the hearing of the substantive application (see *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617).

[36] Having perused the grounds of judgment of the learned judicial commissioner, I am of the view that she has erred in two aspects. The first is her failure to recognize the application before her only requires an evaluation of the allegations of the appellants as to whether further investigation is required in deciding whether to grant or refuse an order of certiorari. Second, on the allegations as presented by the appellants, she has failed to appreciate that there could be a breach of natural justice if the Minister is to hear the appeal brought by the appellants under s 21(1)(a) of the SD Act. This by itself would constitute an exception to the general rule that judicial review is not an option when there is an alternative remedy available by way of appeal. The appellants' application is therefore not frivolous and vexatious to justify refusal of leave in limine.

ANOTHER PROCEEDING INSTITUTED BY THE APPELLANTS

[37] Before I conclude, there is one other issue raised by the federal counsel and this concerns the appellant having instituted another separate set of proceeding before the High Court at Kuala Lumpur bearing Case No GS R 2-22-04-2005. According to the federal counsel, the appellants have abused the court process and should be barred from succeeding in this appeal.

[38] On this, all that I need to say is firstly, there is no record before us as to the nature of this other case allegedly filed by the appellants. Secondly, as this issue requires further investigation on an inter partes basis then it should only be raised and considered at the hearing of the substantive application of whether to grant or refuse an order of certiorari after leave has been granted, and not at this preliminary stage. The raising of this issue is premature.

CONCLUSION

[39] For reasons aforesaid, I have allowed this appeal with costs to the appellants. Deposit for this appeal to be refunded to the appellants.

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Low Hop Bing JCA:

APPEAL

B [40] This is an appeal brought by the appellants- applicants (“the applicants”) against the decision of the learned judge of the Kuala Lumpur High Court made on 9 August 2005, dismissing the applicants’ application for leave to commence judicial review by way of certiorari under O 53 r 3(2) of the RHC.

C FACTUAL BACKGROUND

[41] The applicants are suing on their own behalves and on behalf of the Malaysia Taekwondo Association (‘the Association’).

D [42] The respondent is the Commissioner of Sports (‘the Sports Commissioner’).

[43] The Association was until 6 May 2005 a registered sports body pursuant to s18 of the Sports Development Act 1997 (‘the Act’) but on 6 May 2005 became an unregistered and unincorporated sports body with no legal personality.

E [44] A reference to a section hereinafter is a reference to that section in the Act unless otherwise stated.

F [45] Originally, the applicants sought leave to issue certiorari to remove the Sports Commissioner’s show cause letter dated 15 April 2005 (‘the show cause letter’) 3 as well as the order of revocation dated 6 May 2005 made by the Sports Commissioner under s 20 (‘the revocation order’). However, the applicants have now confined themselves to the application for leave in relation to the revocation order only.

G [46] The Association was formed in 1974 and is affiliated to the World Taekwondo Federation (‘WTF’) and the Olympic Council of Malaysia.

[47] The Association is the only sports body recognized by the WTF to run the WTF style of Taekwondo, which is a recognized Olympic sport.

H [48] The Association has 17 full voting members representing 13 states, two Federal Territories, and one member each for two organizations viz the Malaysian Armed Forces and the Malaysian Universities Sports Council. There are therefore only 17 votes to represent about 300,000 practitioners of Taekwondo in Malaysia.

I [49] The constitution of the Association provides for the admission of associated members who are individuals and who do not represent any state or district.

[50] On 13 April 2005, the Sports Commissioner received and considered the proposed amendments to the constitution of the Association including articles 5.8

and 6.4 specifically (collectively 'the proposed amendments') passed at the biennial general conference on 27 March 2005, and was satisfied that there are reasons for him to take action to revoke the Association under s 20(1)(e).

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[51] Vide the show cause letter, the Sports Commissioner gave the applicants an opportunity within 14 days from the date thereof ie on or before 29 April 2005 to submit reasons, if any, against the proposed revocation.

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[52] In response thereto, the Association vide letter dated 16 April 2005 informed the Sports Commissioner that the proposed amendments were only for the purposes of development of the sport and its management, and not otherwise, and would like to know how the proposed amendments could be hindering the development of the sport.

C

[53] Vide letter dated 6 May 2005, the Sports Commissioner informed the Association that the Sports Commissioner had considered and was not satisfied with the explanation contained in the Association's said letter. The Sports Commissioner had vide Form 5 decided to revoke the registration of the Association with effect from 16 May 2005 on the ground that the Association is hindering the development of the particular sport of taekwondo and that it is in the public interest to revoke its registration pursuant to s 20(1)(e).

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[54] The applicants alleged that the Minister has made various 'uncontradicted, unretracted and unchallenged press statements' in the *New Straits Times* from 13 January 2005 to 4 May 2005, showing the Minister's prejudice and prejudgment.

[55] On 12 May 2005, the applicants applied to the Kuala Lumpur High Court for leave to issue certiorari. The learned judge had on 9 August 2005 refused leave. Hence the instant appeal before this court.

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TWO STAGES UNDER O 53 OF THE RHC

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[56] It is to be noted that the judicial review procedure under O 53 provides for two stages.

[57] The first stage, available under O 53 r 3(1), necessitates the obtaining of leave, as no application for judicial review under O 53 shall be made unless leave therefor has been granted in accordance therewith. This concerns the preliminary application under O 53 r.2(2) for leave to commence judicial review proceedings. Leave may be granted or refused in limine as the case may be. Illustrations of cases which concern the first stage in which leave has been refused in limine include:

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- (i) *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 (CA) in which the High Court's leave refusal in limine was affirmed by the Court of Appeal;
- (ii) *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 (CA) in which the Court of Appeal reversed the High Court's leave

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- A** refusal in limine in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332 (HC); and instead granted leave on appeal, but the Federal Court had on 6 July 2007 in *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors* [2007] 5 MLJ 125 affirmed the High Court's leave refusal in limine, thereby overruling the Court of Appeal; and
- B** (iii) *Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 MLJ 53 (HC), where leave was refused in limine by the High Court.

[58] The second stage is regulated by O 53 r 4(1) and (2). That concerns the substantive application for certiorari after leave has been granted. Authorities which revolve around the second stage include:

- C**
- (i) *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 (SC);
 - (ii) *Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602 (CA); and
- D** (iii) *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707 (CA).

- E** [59] As the instant appeal arose from the High Court's leave refusal in limine at the first stage, I am of the view that only the authorities which expound on the ramifications of the first stage are directly relevant and merits consideration here. However, on the other hand, the authorities which deal with the second stage, after leave has been granted, are unlikely to be of any assistance in the determination of the instant appeal.

FAILURE TO EXHAUST ALTERNATIVE REMEDY

- F** [60] It was submitted by applicants' learned counsel Dato MS Murthi that this appeal is focused on one single point of law ie whether the High Court was right in refusing leave on the ground that the applicants have not exhausted the alternative remedy by way of an appeal to the Minister of Sports ('the Minister'). He added that the word 'may' in s 21 is permissive, and not compulsive and not mandatory, as opposed to the word 'shall'. He relied on the Court of Appeal judgment in *QSR Brands Bhd*.
- G**

- H** [61] Learned Senior Federal Counsel Ms Suzana Atan contended that the applicants being aggrieved by the revocation order made by the Sports Commissioner should first appeal under s 21(1) to the Minister within 30 days of the notification of the Sports Commissioner's decision. The High Court agreed. The contention presented for the Sports Commissioner was sustained.

- I** [62] Given that backdrop, the question which calls for determination in the instant appeal is whether the appellants are at liberty to leapfrog and circumvent the alternative remedy created in s 21(1), so as to apply direct to the High Court for leave to commence judicial review under O 53 ('the question').

[63] In my judgment, the relevant provisions of the Act which merit consideration are ss.20(1)(e), 21(1) and 21(2).

[64] Section 20(1)(e), where relevant, provides as follows:

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Revocation... of registration by Commissioner.

20(1) The Commissioner may revoke... the registration of a sports body if the Commissioner is satisfied that such sports body:

(a) ...;

B

(b) ...;

(c) ...;

(d) ...;

(e) is hindering the development of the particular sport and it is in the public interest to revoke... its registration;

C

(f) ...;

(g) ...

[65] Section 21(1) and (2), where relevant, read:

D

Appeals

21.(1) Any sports body aggrieved by a decision of the Commissioner:

(a) ...;

(b) ...;

E

(c) in revoking or suspending the registration of such sports body;

may, within thirty days from the date of notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.

(2) Before making any decision under subsection (1), the Minister may refer the matter to the Sports Advisory Panel.

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[66] Upon a true construction of the above provisions, it is abundantly clear to me that the revocation of registration of a sports body by the Sports Commissioner under s 20(1) would give rise to the applicant's right, exercisable within thirty days from the date of the notification of the decision of the Sports Commissioner, to appeal to the Minister under s 21(1). The Minister's decision thereon shall be final. However, before making any decision on the appeal from the Sports Commissioner's decision under s 21(1), the Minister may refer the matter to the Special Advisory Panel under s 21(2).

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[67] In applying for leave under O 53 r 2(2), instead of preferring an appeal to the Minister under s 21(1), the applicants have not exercised and indeed have abandoned their rights in having chosen not to exhaust the alternative remedy made available to them under s 21(1).

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[68] Are the applicants entitled to do so?. The answer may be ascertained by an analysis of the authorities cited for the parties herein.

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[69] In *QSR Brands Bhd*, cited for the applicants, the appellant company was the target company in a takeover bid made by Kulim (Malaysia) Bhd, the second

- A** respondent. Being unhappy with this, the appellant's board engaged the Securities Commission, the first respondent, in some correspondence. On 14 October 2005, the Securities Commission wrote, refusing an extension of time for the appellant's board to take the usual steps with regard to the takeover bid in accordance with the Take-Over Code. The appellant then applied for leave to issue judicial review
- B** proceeding against the Securities Commission. The High Court refused leave on two grounds viz:
- (i) that the appellant had failed to exhaust the alternative remedy; and
 - (ii) that the appellant lacked the standing or locus standi to make the application.
- C** [70] The appeal against the High Court's leave refusal was dismissed by the Court of Appeal, not on the first ground but on the second ground ie lack of locus standi.
- [71] Hence, the leave refusal in limine was affirmed by the Court of Appeal on the second ground.
- D** [72] In relation to the argument based on the first ground ie failure to exhaust an alternative remedy, Gopal Sri Ram JCA enunciated the relevant principles as follows:
- (i) Arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage, as the sole question at that stage is whether the application is frivolous: *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68 (SC); *JP Berthelsen v Director-General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (SC); and *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 (CA);
 - (ii) The existence of an alternative remedy does not automatically and without more oust the court's judicial review jurisdiction;
 - (iii) The correct approach is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on the substantive application;
 - (iv) The discretion is still with the courts, but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown:
 - (a) a clear lack of jurisdiction;
 - (b) a blatant failure to perform some statutory duty; or
 - (c) in appropriate cases, a serious breach of the principles of natural justice: *Jagdis Singh*.
 - (v) An applicant for certiorari is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy: *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 (FC); *R v Postmaster General Exp Car Michael* [1928] 1 KB 291; nor need an applicant have, before he can apply for that remedy, exhausted his right of appeal to a court of law: *The King v Wandsworth Justices* [1942] 1 KB 281.

[73] His Lordship concluded, 'that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A fortiori, it is a matter which does not fall to be considered on a leave application.'

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[74] It is to be noted that in relation to the alternative remedy issue, *QSR Brands* followed the majority judgment of the Court of Appeal delivered by Gopal Sri Ram JCA in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60 where the applicants sought leave to commence judicial review in the High Court. I dismissed the application and refused leave in limine: see *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332 (HC). However, the Court of Appeal allowed the appeal and granted leave to commence judicial review proceedings. On further appeal, in *Pengurusan Danaharta Nasional Bhd v Tang Kwor Ham & Ors and another appeal*, the Federal Court reversed the majority judgment of the Court of Appeal. The Federal Court in the judgment delivered by Alauddin FCJ ('the Federal Court judgment') upheld the High Court's leave refusal in limine.

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[75] The Federal Court was requested to consider three questions of law viz:

- (1) What is the proper test to be applied in an action for leave for judicial review?
- (2) What amounts to a decision of a public authority within the meaning of O 53 of the RHC? and
- (3) Does s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 oust the jurisdiction of the courts to entertain an application for judicial review?

E

[76] At the hearing of the appeal before the Federal Court, it was intimated to the parties that the Federal Court would only consider Question 3, to which all parties agreed and counsel made their submissions. The Federal Court answered Question 3 in the affirmative and held in para 52 thereof that the Court of Appeal in granting leave to issue an application for certiorari under O 53 r 3 had run counter to s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 which provides Danaharta with insulation or immunization in the following words:

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Limit on the grant of orders of court.

72. Notwithstanding any law, an order of a court cannot be granted —

- (a) which stays, restrain or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
- (b) which stays, restrains or affects any action take, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
- (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,

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and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise. (see also *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervenor)* [2004] 2 MLJ 257 (FC); and *Naga Jaguh Development Sdn Bhd v Danaharta Urus Sdn Bhd* [2005] 3 CLJ 818 (HC))

- A** [77] In paras 21, 23 and 24 of the Federal Court judgment, Alauddin FCJ (as he then was) observed that the majority judgment of the Court of Appeal had held that the High Court should not have gone into the merits of the case at the leave stage. His Lordship added that the majority judgment of the Court of Appeal itself went further to consider the merits of the application at the leave stage ie whether the appellant Danaharta was in fact amenable to judicial review.
- B**
- C** [78] In the light of the Federal Court judgment, I am of the view that the High Court is at liberty and indeed duty bound to consider any point raised, including the alternative remedy point, at the first stage of leave application under O 53 r 3(1). The consideration of whether leave should be granted or refused in limine involves an exercise of discretion. That discretion must be exercised according to established judicial principles, having regard to all the facts and circumstances of each particular case.
- D** [79] In this connection, it needs to be observed that where there is an appeal provision available to the applicants herein, certiorari should not normally issue unless the applicants can discharge the burden of proving any of the following exceptional circumstances:
- E** (a) there is a lack of jurisdiction on the part of the Sports Commissioner in relation to the decision complained of ie the revocation order;
- (b) there is a blatant failure by the Sports Commissioner to perform some statutory duty;
- (c) the Sports Commissioner has committed a serious breach of the principles of natural justice, or
- F** (d) illegality (see *Ta Wu Realty* at p 526 lines 4 to 11.)
- G** [80] Upon a proper perusal of the factual background alluded to above, I am of the view that the applicants have failed to establish any of the above exceptional circumstances against the Sports Commissioner. I am unable to find any fact falling within the compass of exceptional circumstances.
- H** [81] Most importantly, the Sports Commissioner by issuing the show cause letter to the applicants had given the applicants an opportunity of being heard. That is clearly in compliance with the fundamental rules of natural justice. On the part of the Sports Commissioner, there is not an iota of a breach, less so a serious breach, of the fundamental principles natural justice.
- I** [82] Allegations were actually directed against the Minister. However, the Minister is not a party to the proceedings before the High Court nor in the appeal herein. These allegations which the applicants had made against the Minister are in my view irrelevant to the consideration of the application before the High Court and now the instant appeal. Those allegations would only be called into question and consideration, if at all, when there is an application for leave to commence judicial review against the Minister. Until then, I should refrain from venturing any speculation.

CONCLUSION

[83] As the applicants herein are unable to prove the existence of any of the above exceptional circumstances against the Sports Commissioner, the answer to the question is in the negative. Hence, I hold that the High Court has rightly refused leave in limine at the first stage. I therefore dismiss this appeal with costs and affirm the decision of the High Court. Deposit to the Sports Commissioner on account of taxed costs.

Suriyadi JCA:

[84] The appellants had filed a judicial review application, for an order that they be granted leave to apply for an order of certiorari, to remove a show cause letter dated 15 April 2005 and to quash the order of revocation of registration of the appellants' association, the Malaysia Taekwondo Association ('MTA'). This body was the only sports body that was recognized by the World Taekwondo Federation to run the World Taekwondo style of taekwondo, which is a recognized Olympic sport. This order of revocation of registration, dated 6 May was issued by the respondent under section 20 of the Sports Development Act 1997.

[85] The order of revocation of registration came about as the Sports Commissioner had directed the MTA to amend its constitution, to allow voting rights to clubs, a power of direction which was disputed by the appellants. It is not necessary in this case to detail out the full facts, but suffice to state that the MTA did not give in, resulting in the respondent deregistering the MTA. From the point of view of the appellants they had two options, namely, to appeal to the Minister under s 21 of the SD Act or to go direct for judicial review. They opted for the latter avenue.

[86] The appellants had sued on their own behalf and on behalf of the said Malaysia Taekwondo Association (MTA) pursuant to O 53 r 2(4) of the RHC. The relevant complete provision reads:

Application (Order 53 r 2)

- (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form III A.
- (2) An application for judicial review may seek any of the said relief, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.
- (3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

- (4) *Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.* Leave (Order 53 r 3)

- A (1) *No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.*
- (2) An application for leave must be made ex parte to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

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[87] At the hearing before the High Court the appellants failed to obtain that leave hence the filing of this appeal. In brief the learned judge had held that the judicial review application was premature, and that the appellant must exhaust the domestic remedy first, before proceeding to the court for review. Apart from disagreeing with the court's above view, the memorandum of appeal also stated that the learned judge had erred in law in failing to make a distinction between the word 'may' and 'shall,' and failing to rule that it was not mandatory to exhaust the remedy of appealing to the Minister let alone there was evidence of the latter's prejudices. The appellants had also canvassed that this issue of optional judicial review was a point of law and hence substantive in nature which required a full hearing.

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[88] The appeal was heard by us and allowed with costs in a majority decision. I was in the majority. I now lay down my reasons for agreeing to allow the appeal. The supporting statement pursuant to O 53 r 3(2) documentarily established the appellants as having the necessary locus standi. All six appellants indisputably were office bearers of the MTA, the first being the chairman, second, third and fourth appellants as vice-chairmen, the fifth appellant as the secretary and the sixth appellant as the treasurer. The first appellant in his affidavit had also affirmed that he had filed the action on behalf of himself and on behalf of the second to the sixth appellants. In other words all had interest and some nexus with the MTA by virtue of their official position in it. They were interested in the well-being of the association and had not filed the application as mere busy bodies or mere cranky public-spirited citizens. Not only had the appellants lost their association but also their respective positions.

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[89] Elaborating on the locus standi issue further, both parties had agreed that the MTA had no legal rights or legal power to file the application. It was an unincorporated body and thus not a legal entity and without any legal personality (*Karting Club of Singapore v David Mak & Ors* [1985] 2 MLJ 280). That being so the only available solution was for the office bearers to take up the action. In *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204 at p 210 the court had stated:

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First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act, and section 9(c) thereof specifically provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that that is so, then we would think that if it was at all necessary for the Association to sue jointly as a plaintiff *a representative claim by one or more of its office-bearers on behalf of all the members would be the solution.* (Emphasis added.)

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[90] In this case there was nothing wrong for the six of them to file the action on behalf of the other members. In fact even one person would have sufficed. Order 15 r 12(1) promulgates:

Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

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[91] In support of this representative action, even if there was no outward support for it, p 424, para 15.12.5 of the *Malaysian High Court Practice 2003 Desk Edition*, reads:

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The representative plaintiff

If the plaintiff is claiming on behalf of himself and others (ie as a representative plaintiff), he may proceed without the consent of the members of the class: *Pan Atlantic Insurance Co & Republic Insurance Co v Pine Top Insurance Co* (1988) 2 Lloyd's Rep 505 at 509, HC. The fact that there are two opposing factions within a native community does not prevent an action from being a representative action: *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* (1990) 3 MLJ427.

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[92] That takes care of the preliminary issue as it was clear that they had a standing to take up the action before the court (*Lim Cho Hock v Speaker Perak Legislative Assembly* [1979] 2 MLJ 85). Needless to say too if the locus standi issue were not established the leave application would have died a natural death; this issue may still be resubmitted by the respondents at the substantive hearing stage. A challenge on locus standi may be remounted at the subsequent hearing stage perhaps due to some changed circumstance.

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[93] The next stage was for the appellants to establish a prima facie case for leave, in that their application was not frivolous or vexatious (*George John v Goh Eng Wah Bros Filem Sdn Bhd & 2 Ors* [1988] 1 MLJ 319). Having perused the evidence, apart from a personal interest by the respective appellants who had seen their association and respective positions becoming history, the matter of public interest in this application was quite uppermost for consideration. This factor of public interest, which was submitted at the outset of the hearing, and as a consequence of deregistration by the respondent of the MTA on 1 January 1998, had led to the country being deprived of a Taekwan Do representation at the Doha Meet, the Olympics and some other sporting event. Only by reinstatement as a sports body by the respondent (the Commissioner of Sports Malaysia), would Malaysia have a fighting chance to obtain some glory in international sporting meets, let alone the appellants redeem themselves.

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[94] The sister Taekwan Do body registered as the International Taekwan Do Federation could not represent the country as it was not an organization that was recognized by the World Taekwan Do Federation. In a word the intention, the action and the probable positive result that would ensue from a successful reinstatement, could never be construed as frivolous or vexatious. In fact these findings would have sufficed for a High Court judge to grant "order in terms" for the leave application.

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[95] As the High Court judge had made certain findings, for the sake of completeness, I would like to touch on them. The High Court judge in her judgment

- A** had made much of the issue of domestic remedy in that the judicial review application was premature, whereby the appellants must exhaust it first before being entitled to apply for leave of the court. This was on the premise that as a certiorari order was a discretionary remedy it could be denied by her Ladyship if an alternative remedy was available. I now reproduce the relevant provisions, which had the availability of domestic remedy that led to the view. Sections 20 and 21 of the SD Act read:

Section 20:

Revocation or suspension of registration by Commissioner

- C** 20(1) The Commissioner may revoke or suspend the registration of a sports body if the Commissioner is satisfied that such sports body —
- (a) has been registered as a result of a fraud or a mistake or misrepresentation in any material particular;
 - (b) has failed to comply with any of the conditions imposed by the Commissioner under s 18;
 - D** (c) has contravened any provision of this Act or any regulations made thereunder;
 - (d) is inactive or is no longer a fit and proper entity to be registered to represent its sport in any State or in Malaysia;
 - E** (e) is hindering the development of the particular sport and it is in the public interest to revoke or suspend its registration;
 - (f) has failed or neglected to remedy any malpractice, misconduct or irregularity on the part of its office bearers or its members within the period specified in the written notice given by the Commissioner; or
 - F** (g) is inactive, uncooperative or obstructive in the implementation of the regulations, policies or guidelines made under or pursuant to powers under this Act.

Before revoking or suspending the registration of a sports body under subsection (1), the Commissioner shall give the sports body an opportunity to submit reasons, if any, against the proposed revocation or suspension. Appeals.

Section 21(1) Any sports body aggrieved by a decision of the Commissioner —

- G** (a) in refusing to register such sports body;
- (b) in imposing conditions on the registration of such sports body; or
- (c) in revoking or suspending the registration of such sports body, may, within thirty days from the date of the notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.
- H** (2) Before making any decision under subsection (1), the Minister may refer the matter to the Sports Advisory Panel.

- I** The court, founded on the above s 21, had opined that by so not appealing to the Minister within 30 days of the Commissioner's decision, such failure must be viewed unsympathetically. In the *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 the Supreme Court also had held that:

The first principle to note is that certiorari is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather than the final determination of individual rights. The jurisdiction is sometimes referred to as an

“extraordinary” original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary. There is said to be a subsidiary rule to the effect that certiorari is not normally issued if the applicant has an alternative remedy available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.

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[96] *Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602 at p 608 had occasion to state that —

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Now, it is well settled that certiorari is one of those remedies in public law which cannot be claimed *ex debito justitiae*, but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case.

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One of the grounds on which the remedy of certiorari may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an alternative forum. Sometimes, the alternative remedy is given by statute ...

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[97] The above was the law of the day as regards the remedy of certiorari.

[98] The respondent in its submission had come out rather strongly when it inter alia submitted:

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The process envisaged by Parliament clearly intends the remedying of any matter related to sports development in the country to be dealt with in accordance with the processes prescribed. Any appeal against any decision of the Sports Commissioner is to be dealt with by the Minister who is aided by a Sports Advisory Panel. This Sports Advisory Panel is empowered to make recommendations to the Minister. If persons, assuming the Appellants are even for one moment can be said to be within that category can come to court without having first pursued the matter in the manner intended by Parliament, it can be said that Parliament may have legislated in vain. Matters concerning sports, its development and its administration were wisely considered by Parliament to be better resolved outside the realm of the courts until the appropriate moment.

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[99] As said above, the High Court had found itself bound by the above legal pronouncements and the strong submission by the respondent, more so when s 21 was supposedly quite succinct in its contents. The court had concluded:

With regards to the various grounds of objection raised by the learned senior federal counsel, in relation to the leave application, I am of the opinion that one issue alone would suffice for this court to decide whether leave for the judicial review ought to be granted in particular the non-exhaustion of remedies. From the submissions made by both parties I am inclined to agree with the learned federal counsel that the applicants failed to make use of the domestic remedy provided for under the Sports Development Act 1997. To my mind the application before me is premature. It is explicit that s 21 (1)(c) of the said Act provides that any sports body aggrieved by a decision of the Sports Commissioner in revoking its registration may appeal to the minister within 30 days of the notification of the Commissioner's decision. I am also of the view that it is improper at this stage to assume that the minister has prejudged the matter and therefore prejudiced at this early stage. I am also in agreement with the learned federal counsel that Parliament's intention is provided for

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A in Act 576 and in the exercise of my discretion and for the reasons above, I hereby refused leave and dismissed the application with costs.

B [100] As regards the law pertaining to a certiorari being a discretionary remedy, and the consequential actions to be undertaken subsequently, especially when there is a domestic remedy at hand after leave has been obtained, I have no quarrel with it as reproduced above. The all paramount question in this case is, must the issue of domestic remedy be canvassed and decided by the judge at this early stage ie at the stage of the leave application? Before discretion is to be applied a judge must be appraised of all the facts first. Nothing must be arbitrary. Here the scenario was as follows: the judge had no affidavit in reply to peruse and consider, an incomplete set of evidential and legal argument regarding the factor of domestic remedy, the appellants were harping on some other equally serious issue let alone supported by evidence that the Minister could be biased, to expect the judge to apply his discretion correctly then (as regards the issue of alternative remedy), was an unreasonable expectation.

D [101] In fact as there was no affidavit in reply the appellants should have won hands down in the circumstances of the case. Surely the purpose of leave would be defeated if such a substantive matter such as this must be resolved at such an early stage. Recently too, in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 the Court of Appeal, when dealing with a similar issue, had ruled that the question of exhaustion of domestic remedy was not an issue at the leave stage. The issue of alternative remedy went to the merit of the substantive application, with the court only to gauge whether the application before it was frivolous or not.

E [102] The appellants in the course of the appeal had stated that the wording of s 21 was such that it was open to another interpretation, in that the court was an alternative remedy to that of a decision by a Minister. This submission was legalistic and could not be brushed off off-handedly. Nothing was stated that the doors of the court were shut in the circumstances of the case, especially when the Minister, prima facie as per the newspaper cuttings, holding the same view as the respondent had already directed the MTA to amend the constitution, a partial stance which did not bode well for the appellants. Whether this interpretation of the appellants was correct or otherwise, similarly as in the above explanation, should only be resolved at the stage after leave had been granted and not before. It was substantial enough to deserve a full blown hearing. For the reasons supplied I had allowed the appeal with costs.

H *Appeal allowed.*

Reported by Sally Kee

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